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NO. 80-495

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DONALD E. LESTER, JR., AND SUE FURGER LESTER,
Petitioners

VERUS

LAURA ANDERSON, EXECUTRIX OF THE ESTATE OF
R. C. ANDERSON,
Respondent

ON WRIT OF CERTIORARI TO THE LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CATHERINE L. STAGG
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QUESTIONS PRESENTED FOR REVIEW

I. Is a creditor who illegally refuses to perform the acts required by 15 U.S.C. 1635 (b) to effect rescission of a consumer loan under the Truth in Lending Act required to return to the consumer all money received from the consumer and to forfeit to the consumer the balance of the loan proceeds?

II. Is a creditor who illegally refuses to perform the acts required by 15 U.S.C. 1635 (b) to effect rescission of a consumer loan under the Truth in Lending Act required to pay civil penalties and attorney's fees to a consumer who sues for this violation of the Act?

LIST OF PARTIES

Petitioners: Donald E. Lester, Jr. and Sue Furger Lester, husband and wife.

Respondent: Laura Anderson, Testamentary Executrix of the Estate of R.C. Anderson.

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INTEREST OF THE AMICUS CURIAE

The Unfair Trade Practices and Consumer Protection Law, also known as Louisiana's "Mini-F.T.C. Act," La. R.S. 51:1400-1418, was enacted by the Louisiana Legislature in 1972 for the purpose of affirmatively declaring unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." La. R.S. 51:1405 A. The enforcement of the Act is entrusted to the Attorney General of the State of Louisiana. The Attorney General is empowered by the Act to institute legal proceedings and to take other such actions which are provided by the Act itself or which are necessary or incidental to the exercise of his powers and functions. La. R.S. 51:1404 C.

Section 1406 (4) specifically exempts from the scope of the Act "any conduct which complies with section 5 (a) (1) of the Federal Trade Commission Act [15 U.S.C., 45(a) (1)], as from time to time amended,

any rule or regulation promulgated thereunder and any finally adjudicated court decisions interpreting the provisions of said Act, rules and regulations." This provision of the Act has been cited by Louisiana courts as authority to incorporate into Louisiana jurisprudence the federal law and federal jurisprudence arising under the Federal Trade Commission Act. In Guste v. Demars, 330 So. 2d 123 at 125 (La. App. 1st Cir. 1976), Louisiana's First Circuit Court of Appeal held that:

> The substantive prohibition of the Unfair Trade Practices and Consumer Protection Law is broad and does not specify particular violations... The language of this section tracks closely that of the Federal statute, 15 U.S.C. Section 45(a). Because of the variety of possible unfair and deceptive practices, the Federal statute was intentionally broadly written, leaving the determination of individual violations to the Commission and the courts. Our legislature has expressed a similar intention in patterning our law so closely on the Federal statute. Therefore, we may and should consider interpretations of the Federal courts and of the commission relative to such similar statutes to adjudge the scope and

application of our own statute. State, through Department of Highways v. Braddock, 170 So.2d 5 (La. App. 1st Cir. 1964)."

The Demars decision has been followed in the few cases which have confronted Louisiana courts with this question. See Moore v. Goodyear Tire and Rubber Co., 364 So.2d 630 (La. App. 2nd Cir. 1978) and Gour v. Daray Motor Co., Inc. and General Motors, Inc., 373 So.2d. 571 (La. App. 3rd Cir. 1979). Thus, it is established in Louisiana that any conduct that is made unlawful by section 5(a) (1) of the Federal Trade Commission Act and the rules and regulations of the Federal Trade Commission promulgated thereunder is also illegal under Louisiana's "Mini-F.T.C. Act."

Additionally, Louisiana courts have accepted by implication a second method of defining unfair or deceptive practices under the Louisiana act by "piggybacking" the Louisiana act on top of another state or federal statute in order to find an unfair trade

practice. Simply stated, a violation of another law constitutes a per se violation of the Louisiana Unfair Trade Practices and Consumer Protection Law.

In State v. Council of City of New Orleans, 309 So.2d 290 (La. 1975), the Attorney General attempted to have the ten per cent late payment charges imposed by the New Orleans Public Service, Inc., and approved by the New Orleans City Council, declared null and void and to have their levy and collection permanently enjoined. One theory relied on by the State was that the charge was usurious under Louisiana Civil Code Articles 1935 and 2924 and thus the charge was per se an unfair trade practice under the Louisiana Act. The Louisiana Supreme Court found that the late charge was not usurious and therefore held that no unfair or deceptive trade practice had been proved.

Similarly, in Faris v. Model's Guild, 297 So.2d 536 (La. App. 4th Cir. 1974), Judge Morial held unenforceable a contract entered into in violation of the licensing provision of the Louisiana Proprietary Schools Act, La. R.S. 17:3141.1 et seq. However, the court denied recovery under the Louisiana Unfair Trade Practice and Consumer Protection Law only because the plaintiff could prove no actual damages. The implication is that, had plaintiff been able to show actual damages, she would have received relief under the Act because of defendant's violation of another law.

Congress has delegated overall authority for the enforcement of the Truth In Lending Act, 15 U.S.C. 1600 et seq., to the Federal Trade Commission. Section 1607 (c) of the Truth In Lending Act provides in pertinent part:

> "...For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of

> any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act..."

Thus, Congress has statutorily "piggy-backed" the Federal Trade Commission Act onto the Truth In Lending Act. Therefore, a Truth in Lending violation is also an unfair and deceptive trade practice made unlawful by 15 U.S.C. 45(a) (1). Consequently, it follows logically that a Truth in Lending violation is also unlawful under the Louisiana Unfair Trade Practice and Consumer Protection Law.

Considering the foregoing, the interest of the State of Louisiana, through her Attorney General, in these proceedings is clear. The decisions of federal courts regarding the Federal Trade Commission Act and the Truth In Lending Act have tremendous impact upon the interpretation, application, and enforcement of Louisiana's "Mini-F.T.C." Law. Therefore, amicus curiae submits that an authoritative interpretation of 15 U.S.C.

1635 and a final resolution of the questions presented by petitioners are essential for the guidance of the State of Louisiana, her Attorney General, her courts, her consuming citizens, and her business community when the consumer elects to exercise his right of recission granted by 15 U.S.C. 1635 (b).

ARGUMENT

The questions presented for review by the Lesters' petition for writ of certiorari raise significant issues under the Truth in Lending Act. An answer to these questions from this Honorable Court will reconcile conflicting lines of authority on the proper procedures for effecting a consumer's right to rescind a transaction under Section 1635 (b).

Section 1635 seems to provide, in clear and unambiguous language, a precise statutory scheme for recission.

Notwithstanding the apparent clarity of Section 1635, at least three (3) diverse lines of authority presently exist

regarding the mutual rights and obligations of the debtor and creditor when the debtor elects to rescind a transaction.

The first line of authority holds simply that if a creditor does not fulfill his duty to return property or money received from the debtor and to reflect termination of the security interest within 10 days of receipt of notice of recission, then the debtor need make no tender of the proceeds of the credit transaction and further that the debtor may keep those proceeds with no obligation to pay for same.

This view was first presented jurisprudentially by the Fifth Circuit in Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974). At least two (2) courts subsequently adopted the Sosa rule regarding creditor forfeiture as an incentive for compliance with Section 1635. Strader v. Beneficial Finance Company of Aurora, 551 Pac. 2d 720 (Col. Sup. Ct. 1976) and French v. Wilson, 446 F. Supp. 216

(U.S. D.C.R.I. 1978).

Additionally, on May 29, 1975, the Federal Reserve Board staff issued a Public Information Letter presenting its interpretation of the effect of a debtor's recission. Commerce Clearing House Credit Guide, Paragraph 31,230 (1974-1977 Trans Bind.) That letter bluntly states:

> "If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirements of the subsection, and Staff is of the opinion that the customer need make no tender of the proceeds to the creditor, retaining them without further obligation."

This Honorable Court's decision in Ford Motor Credit Company v. Milhollin, ____U.S. _____, 100 S.Ct. 790, ____L.Ed.2d _____ (1980) makes the Board letter even more persuasive. There this Court held that Federal Reserve Board staff opinions are controlling on questions of interpretation of the Truth In Lending Act and Regulation Z, so long as those opinions are not irra-

tional.

The second line of authority requires a full tender of the proceeds by the debtor at the same time that he gives notice of recission as a condition precedent for a creditor-forefeiture upon the creditor's failure to return property of the debtor and to reflect the termination of the security interest. If the debtor fails to tender the proceeds along with the notice of recission, the court still allows a recission but the creditor does not forfeit his right to recoup the proceeds of the transaction.

This second interpretation has been adopted by the Fifth Circuit subsequent to its decision in Sosa. See Gerasta v. Hibernia National Bank, 575 F.2d 580 (5th Cir. 1978); Harris v. Tower Loan of Mississippi, Inc., 609 F.2d 120 (5th Cir. 1980); and Bustamonte v. First Federal Savings & Loan Association, 619 F.2d 360 (5th Cir. 1980.

Finally, in the third interpretation, embraced by the Fourth and Ninth Circuits, the courts invoke their equity jurisdiction to condition recission itself on a prior debtor tender of the proceeds. Simply stated, if the debtor does not first tender the proceeds, there will be no recission at all and the credit transaction stands. Palmer v. Wilson, 502 F. 2d 860 (9th Cir. 1974); Ljepava v. M.L.S.C. Properties, Inc., 511 F. 2d 935 (9th Cir. 1975); Powers v. Sims & Levin, 542 F. 2d 1216 (4th Cir. 1976).

If in fact Congress intended an absolute creditor forfeiture without prior tender, then the decisions of the Fifth (excluding Sosa), Fourth, and Ninth Circuits have placed an unfair burden on the consumer. A requirement of tender prior to or concurrent with giving notice of recission eliminates the statutorily imposed stimulus for the creditor to take immediate action to clear title and fulfill his obligations.

On the other hand, if Congress did not intend an absolute creditor forfeiture without tender prior to or concurrent with notice of recission, then those jurisdictions which follow the rule of Sosa and the Board's staff opinion are giving the debtor an unauthorized and unjust windfall.

These conflicting interpretations by diverse authorities have created a state of confusion and uncertainty among consumers, extenders of credit, enforcement agencies, and the courts regarding the proper operation of the recission process. Until these conflicts are authoritatively resolved, the Truth in Lending Act's efficacy in enhancing economic stability and encouraging competition among extenders of consumer credit by the informed use of consumer credit will be diminished. Additionally, these conflicting interpretations harm the significant state and federal interests in maintaining certain and uniform expectations under the Truth in Lending Act, the Federal Trade Commission Act, and the various state "Mini-F.T.C. Acts."

SUMMARY OF ARGUMENT

At least three conflicting interpretations of 15 U.S.C. 1635 have been set forth by various federal courts, state courts and administrative agencies. The confusion created by these varying views has an unsettling effect on the enforcement of the Truth in Lending Act, the Federal Trade Commission Act, and the several state "Mini-F.T.C." acts by depriving consumers, extenders of credit, enforcement agencies, and courts of a uniform and certain rule of law to follow. This uncertainty is detrimental to the dual purposes of the Truth in Lending Act, as articulated by Congress, to enhance enonomic stability and to encourage competition among lenders.

CONCLUSION

The conflicting interpretations of 15 U.S.C. 1635 among the federal courts of appeals, the state courts and the Federal Reserve Board have made a certain and predictable enforcement scheme for the debtor's right of recission almost impossible. The instant petition for writ of certiorari has crystallized these conflicting interpretations of the same provision and thus provides this Honorable Court with the proper vehicle to finally resolve the issues of the mechanics of recission and of the mutual rights and obligations of the parties to the rescinded transaction. We therefore respectfully urge that the writ issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this brief of the amicus curiae have been served upon respondent, Laura Anderson, Executrix of the Estate of R.C. Anderson, by depositing same in the United States Mail with first-class postage prepaid and properly addressed to her attorney of record, Russell E. Gahagan, Gahagan and Gahagan, Attorneys at Law, Post Office Box 70, Natchitoches, Louisiana 71457.

I further certify that three copies of this brief of the amicus curiae have been served upon petitioners, Donald E. Lester, Jr. and Sue Furger Lester, by depositing same in the U.S. Mail with first-class postage prepaid and properly addressed to their attorney of record, Henry B. Bruser III, Gold, Little, Simon, Weems & Bruser, Post Office Box 6118, Alexandria, Louisiana 71301.

Baton Rouge, Louisiana, this 21st day of October, 1980.

CATHERINE L. STAGG